

This matter came before Judge Clark on claimant's September 4, 2002, Application for Post Award Medical requesting "Orthopaedic Surgeon To Treat Claimant's Right

Shoulder.”<sup>1</sup> But at the post award hearing the claimant noted respondent was providing medical treatment and temporary total disability benefits. Consequently, claimant was only seeking temporary total disability compensation from October 22, 2002, until November 20, 2002.

Included in Judge Clark’s December 5, 2002, Order, was a designation of a treating physician and the determination that “Temporary total disability payments are ordered paid from October 22, 2002, until the Claimant is released.” Respondent requested review stating, “The specific issues respondent and insurance carrier wish to address are:

1. Whether temporary total disability benefits are appropriate from October 22, 2001 [sic] until the Claimant is released.”

But at the post award hearing respondent limited its argument to whether claimant was entitled to temporary total disability benefits for the time period from October 22, 2002, until November 20, 2002. Respondent argues that from October 22, 2002, until November 20, 2002, claimant’s remedy would be permanent partial disability benefits because she did not meet the statutory definition to qualify for temporary total disability compensation for that time period.<sup>2</sup>

Claimant requests the ALJ’s Order be affirmed and that post-award attorney fees be granted.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the Board finds that the ALJ’s Order should be affirmed.

This is an appeal from a post-award medical proceeding. The facts are essentially undisputed. The respondent’s sole issue raised on review is whether during the time period from October 22, 2002, until November 20, 2002, claimant is entitled to temporary total disability compensation.

On December 31, 2001, the parties entered into an agreed award based upon a 19 percent right upper extremity disability. Claimant retained the right to future medical treatment. On September 4, 2002, claimant filed an Application for Post Award Medical. Respondent authorized treatment with Dr. John Estivo. It appears claimant received some

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<sup>1</sup> The form K-WC E-4 Application for Post Award Medical is signed and dated September 3, 2002, and is stamped received by the Kansas Division of Workers Compensation on September 4, 2002.

<sup>2</sup> When Dr. Estivo provided claimant new temporary restrictions on November 20, 2002, respondent started paying claimant temporary total disability compensation.

physical therapy. On October 14, 2002, Dr. Estivo opined claimant had fully recovered and released her from his care noting her only restriction should be task rotation.<sup>3</sup> On October 22, 2002, claimant was placed on a medical leave of absence because respondent could not accommodate her restriction.

When claimant complained of additional problems, the respondent referred her back to Dr. Estivo for further treatment. On November 20, 2002, Dr. Estivo determined claimant was not at maximum medical improvement and placed temporary restrictions on claimant. The respondent voluntarily started paying claimant temporary total disability compensation from that date.

The post-award hearing consisted of the attorneys' arguments and introduction of exhibits without any additional testimony. At the post-award hearing, claimant's counsel advised the ALJ that claimant was seeking temporary total disability benefits from October 22, 2002, until November 20, 2002. A request for post-award attorney fees was also made. Claimant's counsel noted that claimant was being provided medical treatment with Dr. Estivo and that respondent had agreed to provide temporary total disability benefits from November 20, 2002, until claimant reached maximum medical improvement.

Claimant argues she is entitled to temporary total disability compensation from the date of her medical leave of absence, October 22, 2002, because respondent was unable to provide her accommodation within Dr. Estivo's restrictions.

Temporary total disability is defined in K.S.A. 44-510c(b)(2) as follows:

Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment.

As a general rule, temporary total disability compensation is initially awarded during an injured worker's healing period and a later award is made based on permanent disability after the worker's condition is no longer considered temporary.<sup>4</sup> The demarcation between temporary disability and permanent disability is when maximum recovery is reached or when the injured worker's condition becomes medically stationary or stable.<sup>5</sup>

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<sup>3</sup> P.A.H. Trans., Resp. Ex. 1.

<sup>4</sup> *Rose v. Thornton & Florence Electric Co.*, 4 Kan. App. 2d 669, 609 P.2d 1180, rev. denied 228 Kan. 807 (1980).

<sup>5</sup> *Crabtree v. Beech Aircraft Corp.*, 229 Kan. 440, 625 P.2d 453 (1981).

Consequently, an injury is no longer temporary when maximum recovery is reached or when the worker's condition becomes medically stationary or stable.<sup>6</sup>

In this case it is undisputed that on October 14, 2002, claimant was released from further treatment with permanent restrictions. Dr. Estivo concluded that she had fully recovered. Claimant had reached maximum recovery and her condition was medically stable. Her condition was no longer temporary.

The respondent's failure to accommodate claimant's permanent work restrictions does not alter the fact that on October 14, 2002, claimant's condition was no longer temporary. At that point in time her condition, if any, had become permanent.

The Board concludes an award of temporary total disability benefits from October 22, 2002, until November 20, 2002, was not supported by the evidence. This evidentiary record establishes that claimant's disability, if any, from October 14, 2002, until November 20, 2002, was permanent in nature. Accordingly, the ALJ's award of temporary total disability compensation from October 22, 2002, until November 20, 2002, is reversed.

Claimant requested post-award attorney fees as authorized by K.S.A. 44-510k(c) which provides attorney fees may be awarded pursuant to K.S.A. 44-536(g). That statute provides if the services result in a denial of additional compensation an award of attorney fees may be made.

The evidentiary record reveals that after each of claimant's requests for medical treatment the respondent provided the requested benefits. On September 4, 2002, the claimant filed an application for post-award medical. The respondent complied with the request by authorizing Dr. Estivo to provide treatment. Dr. Estivo prescribed a course of physical therapy and then opined claimant had recovered. She was released from further treatment with the permanent restriction of task rotation. When claimant again developed complaints and requested additional treatment, respondent referred her back to Dr. Estivo and started paying temporary total disability compensation. There is nothing in the record that indicates the respondent was not providing medical treatment.

The matter then proceeded to hearing where claimant requested temporary total disability compensation even though the only evidence provided at the hearing was a report wherein Dr. Estivo indicated claimant was medically stable, had been provided a permanent restriction and was released from further treatment. Without additional evidence or testimony, the only evidence provided at the hearing was that during the time period claimant requested temporary benefits her condition was permanent. As a matter of law she was not entitled to temporary benefits during that time period.

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<sup>6</sup> Id., Syl. ¶ 2.

Because respondent complied with claimant's requests for medical treatment and voluntarily commenced temporary total disability compensation benefits and because there was no evidence to support the request for temporary total disability compensation from October 22, 2002, until November 20, 2002, an award of attorney fees is denied.<sup>7</sup>

**AWARD**

**WHEREFORE**, Administrative Law Judge John D. Clark's Post Award Medical Order dated December 5, 2002, is reversed to deny temporary total disability compensation from October 22, 2002, until November 20, 2002. Claimant's request for post-award attorney fees is denied.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of March 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: David H. Farris, Attorney for Claimant  
Eric K. Kuhn, Attorney for Respondent  
John D. Clark, Administrative Law Judge  
Director, Division of Workers Compensation

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<sup>7</sup> See *May v. University of Kansas*, 25 Kan. App.2d 66, 957 P.2d 1117 (1998).